United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B P/S

Docket No. T-3819

74-2358

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

MARSHALL W. CLARK, JR.,
Appellant

V.

CASPER WEINBERGER
SECRETARY OF THE UNITED STATES
DEPARTMENT OF HEALTH,
EDUCATION AND WELFARE,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

OF THE DISTRICT OF VERMONT

Docket No. 73-235

BRIEF OF APPELLANT

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I. STATEMENT OF FACTS

This is an appeal from the decision of the United States District Court for the District of Vermont affirming the denial of petitioner status by the Social Security Administration. It was the opinion of the District Court that the decision of the Administrative Law Judge was based on substantive evidence.

Mr. Clark applied for disability in 1969 before his epilepsy had developed, and his appeal before the Appeals Council was denied. Reapplication in 1972, after Mr. Clark became an epiliptic met with the denial with which the litigation began.

Petitioner, Marshall Clark, is a thirty-six year old Army veteran. He has had eight years of education and is unskilled in any trade. In addition to grand mal epilepsy, Mr. Clark suffers from the following disabilities: uncorrectable amblyopia of the left eye (partial blindness), occipital deafness, schizophrenia, emphezema, a short leg, knee problem, chronic lumbar strain, chronic sinusitus, and gastritis. During the covered period, Petitioner was daily ingesting the following medication: Dilantin 100 mg., Phenobarb 30 mg., Ornade two spansules per day, Amesec one

capsule t.i.d., Compazine 5 mg. b.i.d., Isuprel Medihaller, Darvon 65 mg., and Talwin 50 mg. (to which drug Petitioner became addicted; Ad. Rec. at 155: "The patient appears to be addicted to Talwin and unfortunately it will be very difficult to wean him off this.").

II. STATEMENT OF THE ISSUES

A. Was the District Court in error in holding that the Administrative Law Judge properly stated and applied the legal test of disability?

B. Even if the Administrative Law Judge applied the proper legal test of disability, was his factual decision based on substantial evidence?

III. ARGUMENT

The Standards of Review

In deciding the two issues raised above, two different standards of review are required. In the second, the relevant question is whether or not the

decision of the Administrative Law Judge was based upon substantial evidence in light of the record. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S. Ct. 456 (1951). The Court there stated the rule as follows: "A reviewing court is not barred from setting aside a Board (NLRB) decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." Universal Camera, supra at 490.

The scope of review applicable to the question whether or not the Administrative Law Judge applied the correct test of disability in a proper fashion differs from the substantial evidence test. In Aubrey v. Folsom, 151 F. Supp 836, 837 (N.D.Ca. 1957), the Court held that the scope of review by this Court under 42 U.S.C. 405 g should go no farther than to determine whether the fact findings are supported by substantial evidence, and whether the agency correctly applied the law to the facts. In Adams v. Flemming, 173 F. Supp 873, 877 (D. Vt. 1959). The Court laid out the same standard in the following terms:

"It is well settled, needing no citation here, that such findings of law are not binding on this Court, and where the law has been misapplied, this Court may properly correct the errors below."

In applying both of the standards mentioned above, courts have been guided by a simple caveat: "The cases are numerous that hold that the Social Security Act should be liberally construed in favor of disability and the intent is inclusion rather than exclusion. (Citations omitted). This is particularly applicable in the case before us where the evidence shows that claimant received serious injuries (as did Mr. Clark) in the military service of our country. Should there by any doubt as to his disability, it should be resolved in his favor. De Paepe v. Richardson, 464 F. 2d. 92, 101 (5th Cir. 1972).

A. The District Court Erred In Holding That The Administrative Law Judge Properly Stated and Applied The Legal Test of Disability.

The legal test of disability under the Social Security Act is whether the claimant is unable to engage in any substantial gainful activity. 1 CCH Unemployment Insurance Rep. ¶12, 427. There are four elements of proof to this test: "1. objective medical facts or clinical findings; 2. diagnoses of examining physicians; 3. subjective evidence of pain and disability as testified to

by the claimant and corroborated by his wife, other members of his family, his neighbors and others who have observed him; and 4. the claimant's age, education, and work history. The tests must be applied in a fair and conscientious manner. Consideration of all of these elements of proof should furnish the examiner with a comprehensive and adequate method of determining whether or not a claimant is disabled with the meaning of the Act." All of these elements of proof must be considered together and in combination with each other, and not just one or two with the others excluded. DePaepe, supra at 94. "The test of inability to engage in substantial gainful employment is primarily a subjective one." Aaron v. Flemming, 168 F. Supp, 291 (M.D. Ala. 1958).

In deciding whether or not the Administrative Law Judge has properly applied the facts to the law, it is worth noting that he failed in three particulars to state the judicially enunciated criteria properly. He found: "In view of all the foregoing, it is my belief and I so find, that the medical evidence of the record (emphasis added) fails to establish that up to June 30, 1971 the claimant's epileptic impairment was so severe that he was prevented thereby from engaging in any substanial gainful activity." (Ad. Rec. at 40)

First, medical evidence of record is not the only criterion; the Court in Da Paepe, supra, enumerated three otners, most particularly "Subjective evidence of pain and disability as testified to by the claimant and corroborated by his wife, other members of his family, his neighbors and others who have observed him". Da Paepa, supra at 94. The Administrative Law Judge failed to state or implement this criterion. He did not consider Mrs. Clark's testimony, and he did not consider Mrs. Morse's letter (Ad. Rec. at 88) in reaching his decision. Mrs. Morse is a nurses aide who has many years experience in dealing with epileptics; she witnessed two grand mal seizures. The weight which should attach to this evidence may be shown by the treatment of similar evidence in Dunn v. Richardson, 325 F. Supp 337, 343 (W.D. Mo. 1971). "In concluding that plaintiff had never had a medically determinable physical impairment of such severity that it disabled her from substantial gainful activity, the hearing examiner ignored plaintiff's testimony that she had only 'light vision' in one eye and the testimony of plaintiff and her sister, who was present at the hearing with plaintiff, that she had been forced to quit her employment because of her blindness. The hearing examiner justified his ignoring of this testimony by stating that 'Examination of the claimant by a Board certified neurologist reveals

that he can find no objective evidence establishing disability in the claimant.' In demanding that Plaintiff establish her claim by objective medical evidence, the hearing examiner imposed an incorrect legal standard. It is true that under the 1967 amendments to the Social Security Act, the physical or mental impairment, to establish disability within the meaning of the Act, must be demonstrable by recognized diagnostic techniques. Section 423(d) (3), Title 42, United States Code. In Santiago v. Gardner (D.P.R.) 288 F. Supp. 156, 159, it was stated that: 'What the 1967 Amendments mean is that disability benefits will not be granted exclusively on the subjective complaints and assertions of the individual, but if there is medical evidence on record this can be used to support and corroborate the subjective symptoms. As declared in Senate Report No. 744, U.S. Code Congressional and Administrative News, 1967, pp. 2882-2883: "Statements of the applicant or conclusions by others with respect to the nature or extent of impairment or disability do not establish the existence of disability * * * unless they are supported by clinical or laboratory findings or other medically acceptable evidence confirming such statements or conclusions. * * *" "The intent of Congress as expressed in the statute and in the legislative history was to emphasize the importance of medical factors in the deter-

mination of disability benefits." While a finding of disability must, under the 1967 amendments, be supported by some medical evidence, it is not necessary that the claim be established by objective medical evidence. Indeed, in Whitt v. Gardner (C.A.6) 389 F.2d 906, 909-910, it was held to be reversible error to require support by objective medical evidence."

The second error in the statement and application of the disability test quoted above is found in the phrase "the claimant's epileptic impairment was (not) so severe that he was prevented thereby from engaging in * * *." The proper statement of the test may be found in Ferguson v. Celebrezze, 323 F. Supp 952, 956 (W.D.S.C. 1964) S 404.1501(b) (1). "'Inability to engage in any substantial gainful activity because of a medically determinable physical or mental impairment which can be expected to continue for a long and indefinite period of time, or to result in death.' In other words, a person can be disabled either by statutory blindness or by other medical provable impairments. It is conceded in this case that the plaintiff does not fall within the requirements of statutory blindness, however, it is obvious that the blindness which the plaintiff does have and which is medically substantiated is sufficient to constitute a disability as defined in (1) above. The Act does not provide that all blindness must be statutory nor that the plaintiff be automatically considered able instead of disabled. There exists, in this case, a combina-

tion of impairments which, when taken together, constitutes a total disability within the meaning of the Act, even though each individual impairment may not in and of itself be of sufficient severity as to be disabling."

The third error found in the above quoted statement of findings is an error of omission. No mention is made of the reality of employability. In the Second and Third Circuits "mere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available. Ellis v. Finch, 333 F. Supp 146 (E.D.P.A. 1971). (3rd Cir.) In Borgia v. Richardson, No. 70-801 (E.D.N.Y. June 10, 1971) the court held that consideration must be given to whether the claimant could fairly compete for these jobs. Dr. Eggisch, Mr. Clark's physician, thought not (Ad.Rec. at 109); the Department of Social Welfare did not think so either. (Ad. Rec. at 176)

B. Even If the Administrative Law Judge Properly Applied The Correct Legal Test, The District Court Erred In Finding Substantial Evidence On The Record As A Whole Since The Administrative Law Judge Disregarded Important Evidence Of Record.

If the court finds that the Administrative Law Judge properly applied the subjective test of disability,

a second question still remains. Is the determination of the Adminstrative Law Judge supported by substantial evidence looking at the record as a whole. Universal Camera, supra; Appellant denies that such a finding could be made, because important evidence of record was totally disregarded by the Administrative Law Judge. What the Administrative Law Judge did was expressed by one court as follows: "The opinion of the examiner discussed some of the non-medical evidence as well as some of the medical evidence, but in his evaluation of the evidence he placed full reliance only on the medical evidence and mainly on the objective medical evidence." De Paepe, supra at 94.

In the Administrative Law Judge's statement of medical evidence, some of the petitioner's disabilities were mentioned: "major seizure disorder, practically blind in the left eye, and moderate occipital deafness". (Ad. Rec. at 35). Other defects were not mentioned: diagnosis of schizophrenia (Ad. Rec. 153), emphezema (Ad. Rec. at 147), short leg (Ad. Rec. at 163), knee problem (Ad. Rec. at 162), sinusitis (Ad. Rec. at 147), lumbar strain (Ad. Rec. at 147), and gastritis (Ad. Rec. at 145). In the section on Evaluation of the Lay and Medical Evidence, no defects were discussed other than epilepsy.

In evaluating the evidence related to epilepsy, the intent towards inclusion rather than exclusion mentioned in Da Paepe, supra, was reversed: great weight was placed on the absence of a positvie EEG although such are absent in 50% of all epileptics of Mr. Clark's type. (Ad. Rec. at 185). No weight was given to the disability award of the VA; diagnoses of physicians were not dealt with in a consistent fashion; testimony of lay witnesses was minimized by the use of inuendo; and many vital pieces of lay and medical evidence were not considered, e.g.; Mrs. Morse's letter (Ad. Rec. at 188), Dr. Engisch's documentation of seizures as early as 1966 (Ad. Rec. at 186).

In the Administrative Law Judge's statement of Mr. Clark's work history, the Administrative Law Judge writes "He (petitioner) worked for the Sugarbush Valley Corporation and worked on a ski lift loading skiers. This was seasonal work, but he did not try to do that work in the winter of 1968 because 'I got to be a nervous wreck, loading and unloading children'." (Ad. Rec. at 33). The Administrative Law Judge failed to mention, although it is recorded in the medical evidence (Ad. Rec. at 162) that petitioner suffered an accident while so employed.

Mr. Clark was knocked from the loading platform by a chairlift. This accident required surgery upon his left knee, and left that joint in a permanently weakened condition. (AD. Rec. at 162).

In analyzing Mrs. Clark's testimony, the Administrative Law Judge's interstitial remarks create inuendos unwarranted by the testimony. "She states that the claimant may have two or three (Seizures a month if he faithfully takes his medication) and doesn't get upset." (emphasis added) (Ad. Rec. at 34).

Q. What's the frequency of the seizures?now? Mrs. Clark: They have been down to maybe two or three, at least.

Q. A month?

A. Yes.

Q. This means your husband faithfully takes his medication? Mrs. Clark: Yes, and doesn't get upset. (emphasis added)

Another example of this technique is the Administrative Law Judge's characterization of Mrs. Clark's testimony as to the dates of seizures. These are characterized as "hazy at best". (Ad. Rec. at 39) They were "hazy" because the Administrative Law Judge badgered the witness: "Have you seen many (seizures)---. How often does your husband have seizures; did he prior to June of 1971? What were the frequency of the seizures? Did he have them once a day, once a month, once a week?" (At. Rec. at 79).

It is perfectly understandable that a person of poor education and dull intelligence would have difficulty pinpointing the date of a particular example of a traumatic

event which occurred frequently but irregularly over the course of years. Little weight ought to be given to Mrs. Clark's inability to remember exact dates.

The Administrative Law Judge used this inability as a basis for discarding Mrs. Clark's testimony from any further consideration. This is manifested by the fact that the only mention of it is the "hazy at best" quote supra.

In analyzing the evidence, the Administrative Law Judge consistently fails to give the evidence in favor of the petitioner's disability equal weight to that which he gives to the contrary evidence. On page 10 of his decision, the Administrative Law Judge quotes from the Social Security regulation as follows: "However, an individual who wil-fully fails to follow such prescribed treatment cannot by virtue of such failure be found to be under a disability". (Ad. Rec. 41, 20 C.F.R. §404.1507). A willful failure in taking medication is implied from one instance when the medication level in the blood of the patient was somewhat less than therapeutic. (Ad. Rec. p.40).

In balancing this observation, there is the evidence given by Mrs. Clark that Mr. Clark faithfully takes his medication (Ad. Rec. at 82, 83); there is the evidence of Dr. Engisch (Mr. Clark's long time personal physician) that Mr. Clark is faithful about taking his medication (Ad. Rec. at 108); and finally, there is the fact that Mr. Clark has had fewer grand mal seizures since he has been given prescriptions for epilepsy medicine. (Ad. Rec. at 154) (ipso

facto he must be taking it).

If the Administrative Law Judge had fairly weighed all of the evidence relating to ingestion of medication, it would appear that Mr. Clark probably does take it. A finding of willful failure has no basis in the facts.

Turning to the evidence regarding epilepsy, the same pattern of stressing the evidence against Mr. Clark is manifest. In discussing the evidenciary standard for epilepsy, the Administrative Law Judge cites Section 11.02 and 11.03 Subpart P, Regulations 4, Social Security Administration (C.F.R. §404) as a "criterion against which the severity of epilepsy may be better evaluated: Epilepsy--major motor seizures (grand mal or psycho motor) substantiated by EEG." This standard may be of some weight, but it should not weigh too heavily as 50% of all epileptics of Mr. Clark's type have normal EEG readings. (Ad. Rec. at 186).

The Administrative Law Judge does quote from Sectio n 11.00 of the Social Security regulations: "Epilepsy must be substantiated by at least one detailed description of a typical seizure, preferably one observed and reported by a physcian. Testimony of reliable lay persons may be acceptable for description of seizures only if professional observation is not available."

The Administrative Law Judge then proceeds to ignore documentation of such seizures in hospital records. (Ad. Rec. at 185, 186). He characterizes Dr. Engisch's observation of a grand mal seizure as "May have witnessed" (p. 40 transcript) although emergency techniques were used to terminate the seizure. (Ad. Rec. at 185). He ignores the letter of Mrs. Morse, (Ad. Rec. at 188, 189), a hospital aid who has had many years experience in dealing with epileptics, which documents two grand mal seizures. His treatment of Mrs. Clark and her evidence is discussed above.

Finally, no weight is given to the VA determination of disability. It has held that such determinations are "highly persuasive" because the definitions are similar to those stated by the Social Security Disability Act (P. 1209 S 12,417 Unemployment Insurance Reporter CCH and cases listed at that section.)

CONCLUSION

The Administrative Law Judge failed to properly apply the subjective test of disability in that he failed to consider the subjective and lay evidence, De Paepe, supra. In addition, his decision is against the weight of the substantial evidence presented considering the evidence as a whole, Universal Camera, supra.

Mr. Clark requests that the Second Circuit of the United States Court of Appeal find him eligible for disability payments under the Social Security Act, 42 U.S.C. §405(g). In the alternative, Mr. Clark prays that the Court remand the case for a de novo hearing.

Submitted this 14th day of November, 1974.

MARSHALL CLARK

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CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of Plaintiff's Brief upon George W.F. Cook, United States Attorney, attorney for the Appellee, by posting copies of the same in a United States mail receptacle, first class mail, addressed to his last known office address, Office of the United States Attorney, P.O. Box 10, Rutland, Vermont, on this 15th day of November, 1974.

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